No. 87-2083

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

THE MOZART COMPANY, a corporation,
Petitioner,

VS.

MERCEDES-BENZ OF NORTH AMERICA, INC., a corporation,
Respondent.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

CASES

Statutes and Rules

Other Authorities

PETITIONER'S REPLY BRIEF

When MBNA, respondent here, sought certiorari in the clone *Metrix* case, it saw it as a tying case and an important one.[1] The issues are all the more important now. The two cases and their conflict were the subject of the best attended panel discussion of the Antitrust Section at the American Bar Association Convention on August 8, 1988.

Yet respondent's brief in opposition now reclothes the case as an "exclusive dealing" one (e.g., its Question 1). An "exclusive dealing" contract provides that one must buy *all* its needs of a product from the vendor if it wishes to buy *any*. A tying arrangement provides that in order to buy Product A, one must also buy Product B from the same vendor. The present is a paradigm tying case; in order to buy Mercedes-Benz automobiles from MBNA, the dealer must also buy its replacement parts from it. *Standard Oil Co. v. United States*, 337 U.S. 293, 305-307 (1949) pointed out that, while exclusive dealing contracts may sometimes serve beneficial purposes, tying arrangements hardly ever serve any purpose beyond the suppression of competition. *Hyde* notes the distinction between the two (fn. 51).

Similarly, MBNA seeks to summon up learning about "ancillary restraints", even placing it in the forefront (e.g., its question No. 1). If ancillary learning applied to a tying agreement, there could *never* be a tying agreement illegal *per se* because what constitutes a tie is precisely the injection into an agreement to sell one product a requirement to buy another. Yet this Court held in *Hyde* that tying agreements can be illegal *per se*. Moreover, the function of "ancillarity" is merely to permit restraints otherwise illegal *per se* to be given rule of reason treatment (Bork, *Ancillary Restraints in the Sherman Act*, 15 A.B.A. Antitrust Law, §§ 211, 212 (1959); Restatement, Second, Contracts § 188 (1981)). Here the jury found unreasonableness under the Rule of Reason.

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[1] Its petition submitted (p. 2): "This case presents antitrust issues of substantial practical importance: the viability of the business justification defense and the applicability of the so-called 'less restrictive alternative' doctrine"; (at p. 20) "an important and recurring antitrust issue."

Respondent argues that the jury's two special verdicts that MBNA violated § 1 of the Sherman Act, both *per se* and under the Rule of Reason, did not mean "violation" because the trial court had told it that MBNA would be in violation only if the jury also found no justification (R. Br. 13, 14). But the verdicts were that the tying arrangement was *anti-competitive*; that is the stark fact MBNA will not confront. Its assertions (R. Br. 14) that " 'business justification' is simply another phrase for . . . rule of reason analysis", which weighs whether "legitimate commercial virtues" are "outweighed by other considerations", are false. As Justice Stevens stated in *National Soc. of Professional Engineers v. U.S.*, 435 U.S. 679, 688 (1978)

> "The Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions."

It is of no consequence that one's purpose is economically desirable. *United States v. General Motors Corp.*, 384 U.S. 127, 142 (1966). The tying agreement here was anticompetitive in the most elementary way, because, in the words of *Associated General Contractors v. Carpenters*, 459 U.S. 519, 528 (1983), it "prevents its victims from making free choices between market alternatives" and is therefore "inherently destructive of competitive conditions."

The major characteristic of respondent's opposition is that it tries to defend the judgment on grounds not countenanced by either court below, instead of justifying what they did decide. For example, respondent argues that tying arrangements are unlawful only if they impact directly on the ultimate consumer, but not when they impact upon dealers who buy and consume in the course of serving the ultimate user (see R. Br. 23, 24), and that the automobile owners who sought repairs could have gone elsewhere than Mercedes dealers (R. Br. 7). When a tie is imposed directly upon the citizen, it is evaluated from his perspective, *Hyde, supra* (imposed on patients seeking anesthesiological service). But when the tie is imposed upon a dealer, it is evaluated from its perspective, *Blanton v. Mobil Oil Corp.*, 721

F.2d 1207 (9th Cir. 1983); *Grappone, Inc. v. Subaru of New England, Inc.*, 534 F.Supp. 1282 (D.N.H. 1982). The basic purpose of anti-tying law is to protect the *competition* in the tied market. *United States v. Loew's, Inc.*, 371 U.S. 38, 45 (1962). "Restraint in the market affects consumers and competitors in the market; as such, they are the parties that have standing to sue", *Bell v. Dow Chemical Co.*, 847 F.2d 1179, 1183 (5 Cir. 1988).

MBNA argues that sales of Mercedes cars in the United States are only a small portion of all automobiles sold (e.g., R. Br. 2) and that there are independent repair shops (R. Br. 7). But this relates to "relevant market". That issue was given to the jury, and its verdict disposed of it by finding that the relevant product was Mercedes cars and replacement parts for Mercedes cars and that the Mercedes dealers were the relevant geographic market.

In short, this *is a tying case.* We examine what little MBNA proffers with respect to the tying issues.

I. Clayton Act § 3 Allows No Defense Of "Business Justification"

"The starting point for interpreting a statute is the language of the statute itself", *Consumer Product Safety Comm'n v. GTE Sylvania,* 447 U.S. 102, 108 (1980). Yet respondent never refers to the text of § 3 or explains how it can be interpreted to allow "justification". Beyond sliding from "tying" to "exclusive dealings" and holding up *GTE Sylvania Inc.*[2] as revolutionizing all antitrust law, MBNA's response is to say that many of the cases we cited "arose" under § 3, naming *International B. Mach. Corp. v. United States,* 298 U.S. 131 (1936) (hereafter "*IBM*"), *Standard Oil Co. v. United States, supra,* 337 U.S. 293 (1949), and two decisions of inferior tribunals, *Pick* and *Matter of General Motors.*

But *IBM* puts the *quietus* to MBNA's contention. There Justice Stone quoted Section 3 and *immediately* stated that its *"precise terms"* made the tie unlawful, adding (p. 137):

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[2] The issue in *Sylvania* was whether a location restraint, was to be judged by a *per se* or a Rule of Reason analysis, whereas in the present case the jury found *both,* so that the debate is irrelevant.

> "We rest it [our decision] rather on the language of § 3 of the Clayton Act which expressly makes tying clauses unlawful."

Then, addressing an attempted justification, the Court said (p. 140):

> "The Clayton Act names no exception to its prohibition of monopolistic tying clauses. Even if we are free to make an exception to its unambiguous command, [citation omitted], we can perceive no tenable basis for an exception. . . ."

The *Pick* case is dead law, as pointed out by the Fourth Circuit in *Metrix* (828 F.2d 1033 at 1039), so much so that, as the court below remarks, MBNA "never seriously relied on *Pick*" (Pet. A-11). In *Matter of General Motors*, a tie-in clause such as MBNA's was ordered discontinued. MBNA cites *Standard Oil* for its statement about "exclusive dealing", ignoring the sharp contrast there drawn with tying arrangements (see p. 1, *supra*). That case aids MBNA not at all relative to Clayton § 3 and, as we now see, also ends its case under Sherman § 1.

II. Sherman § 1 Allows No Justification Of A Tie Except, Possibly, One MBNA Concedes It Does Not Have

Standard Oil, *supra*, held that if there can ever be a justification of a Section 1 tie it can only be when specification is impossible. Both the court below and MBNA agree that MBNA can furnish specifications and in fact did so to those to whom it wished to supply them (see Pet. p. 13).

MBNA's effort is escape is twofold. First, it asks that the law be changed (R. Br. 18-20) and asserts that reliance on *Standard Oil* is an "effort to stop the clock and arrest the development of antitrust principles at 1949" (R. Br. 18). But the court below had no right to reset a clock this Court had set. Then MBNA quotes the belief of an economist, Dr. Stigler, that tying arrangements should not be denounced by law (R. Br. 15-17) and that ability to specify should not be the criterion. Dr. Stigler conceded that he did not purport to testify that MBNA's conduct was lawful; he was only stating his view of what the law would be if based purely

on economic theory as he saw it.[3] The testimony of MBNA's economist witnesses did not address the issue but sought to supplant the law by their views of economic values.

The fundamental thesis of Dr. Stigler's "Chicago School" is that the "free market" should be the organ to protect competition. Yet, here, as respects tying arrangements, it is opined that the free market will not lead the dealers to buy first-rate replacement parts! Other economists, like the Monopolies and Mergers Commission of the United Kingdom, have taken the contrary position (see Pet. pp. 15, 16), as did the *Metrix* court (see Pet., pp. 16, 17). When Congress enacted the Sherman Act in 1890, it did not delegate to shifting economic theory or to contending economic schools the power to determine what antitrust law prohibits.[4] If the law is now to opt for a new slant in economic theory, only this Court can do so.

As a last resort MBNA argues that petitioner's counsel prepared the instructions on justification (e.g., R. Br. 13, 25, 26) but does not deny that Mozart had already presented its objections about justification, first by motion for summary judgment, then by requests for an instruction directing a verdict, then by request for further instructions after the evidence was in, and then by motion for directed verdict before anything was given the jury. A litigant whose basic contentions have been rejected by the trial court is

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[3] Said Dr. Stigler, "I'm not a lawyer" (Tr. 27-11); the "economists live in the world of economics and not in the world of law" (Tr. 27-83). He disagreed with the pronouncement frequently made by this Court that tying arrangements serve hardly any purpose other than the suppression of competition (Tr. 27-85).

[4] See L. Sullivan, *Antitrust* (West, 1977), p. 11:

> "In enacting the antitrust laws Congress had in view other desiderata in addition to the one to which economics grants recognition. The courts have an obligation to attend all of these goals, not just the one which economists also sanction. Thinking and writing about the law as though rational resource allocation were the only goal can only lead to confusion.

Accord, Learned Hand, J., in *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2 Cir. 1945), the trail-breaking *Alcoa* case.

entitled to instructions on a fall-back position without being deemed to have waived its basic position.

Less Restrictive Alternative

Respondent asserts that some parts supplied by independents were inferior to parts from MBNA, although made by the same original equipment manufacturers (R. Br. 8, 9). The evidence does *not* support these statements, but for present purposes we may assume them to be true. They are irrelevant. MBNA could have required its dealers to inform customers whether parts were obtained from MBNA, a requirement not questioned by Mozart (see Pet. p. 16, fn. 12). The consumer could then make his choice, the market would operate, and MBNA's goodwill would not be injured if the part proved inferior. Any contrary conclusion must rest on a contention that an occasional dealer would be guilty of fraud on the customers. The law cannot engage in that kind of assumption. Yet that is precisely where MBNA's economists (quoted R. Br. 17) came to rest: prevention of the hypothetical occasional fraud of a "free rider" justifies the manufacturer's imposing a restriction which, by happy coincidence, enlarges its pocketbook! But judgments like these are not the stuff of fact finding for divers juries to reach divers results. These are matters of legal standards. The opinion below notes that the courts have been skeptical of the quality control defense, but argues that it should be viewed "with less skepticism than it usually has been accorded" (Pet. A-13). The courts have been more than skeptical; until the decision below no quality control defense has ever been accepted. As Justice Stone wrote in *IBM*, 298 U.S. at 139, 140:

> "The very existence of such restrictions suggests that in its absence a competing article of equal or better quality would be offered at the same or at a lower price."

III. "Business Justification" Is Not A Defense To A Claim Of Attempt To Monopolize

MBNA makes no effort to respond to the reasoning of the petition on this subject. It simply asserts, erroneously, that the defense of "business justification" is recognized in attempt-to-monopolize cases, citing as support *Aspen Skiing Co. v. Aspen*

Highlands Skiing Corp., 472 U.S. 585, 608-612 (1985) and three decisions of courts of appeals.

Aspen, does not so hold. Affirming a judgment against defendant for a Sherman § 2 violation, the Court merely held that a finding of absence of "any normal business purpose" supported the inference of "specific intent". This is 180° from a holding that, where the elements of an attempt to monopolize are present, violation can be justified. A particular legitimate business reason might be evidence in support of a finding of lack of specific intent but does not compel it. *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 814, 815 (9 Cir. 1976). As said in *United States v. Columbia Steel Co.*, 334 U.S. 495, 531-532 (1948), "even though the restraint effected may be reasonable under § 1, it may constitute an attempt to monopolize forbidden by § 2 if a specific intent to monopolize may be shown". What may justify under Section 1 is only an item of evidence under Section 2. Respondent does not try to answer our showing (Pet. 19, 20) that the special verdicts *established specific intent* or that the issue of whether there was specific intent should have gone to the jury.

Not one of MBNA's three citations of Court of Appeals' decisions holds what it claims. If they did, that would merely constitute a conflict with the Sixth and Eighth Circuits' decisions in *Alexander v. National Farmers Organization*, 687 F.2d 1173 (8 Cir. 1982), and *United States v. Dairymen, Inc.*, 660 F.2d 192 (6 Cir. 1981) (see Pet. at 21). MBNA avoids even mentioning those cases.

In *Houser v. Fox Theatres Management Corp.*, 845 F.2d 1225, 1231 (3 Cir. 1988), plaintiff failed because there was no evidence to support the "heart" of its claim (p. 1231) that defendant had overbooked films to prevent them from coming to plaintiff. The court held (p. 1231): "[T]he extent of Fox's overbooking is not great enough to support such an inference". In *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7 Cir. 1986), there was also lack of evidence to give the case to the jury, as succinctly summarized in an opinion denying rehearing (802 F.2d 217, 218). *Bell v. Dow Chemical Co., supra*, 847 F.2d 1179, 1185 (5 Cir. 1988), was a refusal to deal case. A refusal to deal is not an antitrust violation (under the *Colgate*

doctrine) except in the case of a monopolist whose purpose is to create or maintain a monopoly (pp. 1184, 1185). The fact of refusal for "legitimate business concerns (such as cost savings, shortage of supplies, more efficient production)", may support a finding of no intention to perpetuate a monopoly (p. 1185).

IV. The Decision Below Conflicts With Elementary Law Of Collateral Estoppel

Why the decision in the Maryland federal courts is not dispositive is an important issue.

Respondent takes as its premise that the kind of collateral estoppel here involved was "offensive" not "defensive" (its Question 2). But this is not a case of "offensive" application, because the issue to which it relates is "justification" of what otherwise would be an antitrust violation. Both courts below treated the burden of establishing "justification" as on MBNA, the party seeking to justify the tie (Pet. A-12, A-46). As to *that* issue, Mozart's position was not "offensive" but defensive, i.e., that MBNA was precluded from its *affirmative* contention by a prior adverse adjudication.

But apart from that, MBNA's argument makes no effort to justify refusal to apply collateral estoppel on the reasoning of either court below. It seeks to do so solely on arguments they rejected. When Mozart moved for a ruling of collateral estoppel, the trial court announced its intention to apply collateral estoppel, rejecting all of MBNA's arguments. When the trial court in *Metrix* later granted a new trial on the amount of damages, the trial court here changed its decision solely because of the view that the *Metrix* decision had ceased to be "final". When it was affirmed by the Fourth Circuit before the instant case was decided in the court below, we submitted and the court below *agreed* and held that "the fact that this decision [of the Fourth Circuit] is subsequent in time to the district court proceedings in the case before us does not bar any preclusive effect that the *Metrix* case might possess" (Pet. A-10). The sole basis of its decision against collateral estoppel is that the evidence was different. MBNA does not try to defend that reasoning, which is so contrary to elemen-

tary law that it alone should warrant, not only grant of a writ, but summary reversal as well.[5]

Still advancing reasons to which the courts below gave no countenance, MBNA argues (R. Br. 20) that the jury instruction on business justification was different from that given in *Metrix*. But MBNA told the Fourth Circuit that the instruction there given was that MBNA could *not* justify at all unless it could not give specifications and that, as MBNA could not satisfy that criterion, the instruction amounted to a *directed verdict* against MBNA. That was precisely the basis of Mozart's motion for directed verdict. MBNA being collaterally estopped on this issue, Mozart's request for a directed verdict should have been granted.

V. Respondent's Discussion Confirms That The Decision Below Rests On Views That Obsolete Tying Law

Respondent dismisses the fact that the decision expressly contradicts *Digidyne* with the comment that the large Ninth Circuit should be left to care for its own conflicts (R. Br. 27 *et seq.*). But something far more important is involved, as respondent's discussion demonstrates.

It says (at p. 21) that after the damages trial takes place in *Metrix*, the case will return to the Fourth Circuit and if it adheres to the views it has already expressed, MBNA will use the repudiation by the court below of *Digidyne* in a petition for certiorari in *Metrix*. That is far more than intra-circuit conflict. The time to nip bad law is now.

MBNA's further discussion (at p. 28) is to the effect that Mercedes sells its automobiles to dealers for less than it can get away with and therefore is entitled to force the dealers to buy their replacement parts from it at higher prices than competitors as a "package sale" at a competitive price. This is a contention that tying law cannot apply because there are not two products but only one, *viz.*, "a package": an automobile, sold in one year,

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[5] Respondent argues that Mozart could have joined in the *Metrix* trial (R. Br. 25) and that in something called the IAP case a judgment went for it (R. Br. 10, 25). Both contentions are false, both were rejected by the trial court, MBNA presented neither to the Court of Appeals. In that court MBNA rested on the contention of lack of finality.

and replacement parts needed for repairs one, two or ten years later and manufactured later, are one product! In the summer 1988 issue of *Antitrust*, the publication of the A.B.A. Section on Antitrust Law (at pp. 40, 41), under the captions "Two Product Issue Continues to Confound Tying Analysis" and "Replacement Parts and Post- Purchase Service," the writer argues that *this is exactly the substance of what was decided below in the present case.*

This is nothing more than the Chicago School's reasoning, as exemplified in Bork, *The Antitrust Paradox*, Chapter 19, that a tie should never be held unlawful because it would never be accepted by a buyer unless the sum of what it pays for the two products is no greater than it would pay in the absence of a tie.

Respondent concludes (R. Br. 30) that what the court below has done, regardless of how it expressed itself, was to adopt a bundle of ideas about "ancillarity", "market power", "lack of consumer forcing, and the like"! This Court's decisions on tying law have not accepted those arguments, and to do so would spell the end of tying law. Yet these are the sorts of law the decision below is being cited as having pronounced. The argument underscores why this case calls for a review by this Court.

Dated: San Francisco, California; September 8, 1988

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